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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 30.

LAWRASON RIGGS, JR., Special Guardian, *Petitioner*,

v.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee.

On Writ of Certiorari to the Surrogate's Court of New York County, State of New York.

BRIEF OF AMICI CURIAE.

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THE MCQUEEN PRESS.

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BRIEF OF AMICI CURIAE.

The undersigned, members of the Bar of this Court, respectfully submit this brief as *amici curiae*, the consent of counsel for all parties having been first obtained. The undersigned act as counsel for trustees of a trust the rights of beneficiaries of which will be affected by the final determination which shall be made in this cause, and, therefore, have a substantial interest in the result.

Argument.

The Court of Appeals has determined that Section 124 of the New York Decedent Estate Law as applied in apportioning the Federal estate tax in this case among the persons interested in the estate, is in conflict with Section 826 (b) of the Internal Revenue Code and that because of the conflict, the application of the New York Statute must fail under Article VI, Clause 2, of the Constitution of the United States. This brief will be restricted to the outstanding question in this case, namely, the construction of the Federal statute. The State statute

can not be attacked on constitutional grounds unless the Federal statute is misconstrued by imputing to Congress an intention to prohibit an apportionment of the Federal estate tax by state legislation.

Construction of a statute consists of a search to find the meaning most probably intended by the Legislature. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 542; Hawkins' *Treatise on the Principles of Legal Interpretation* (Juridical Society Papers, ii 298); Thayer, *On Evidence*, p. 412.

In weighing the probabilities, the general likelihood or unlikelihood of a suggested meaning is important. In the present situation, it is definitely unlikely that Congress was interested in anything more than fixing the amount and assuring the collection of the tax. Certainly it is overwhelmingly improbable that Congress had any intention of entering the field of estate administration and distribution to the extent of supplanting or prohibiting State jurisdiction over such matters, for that is something that it had never done. In addition to these considerations there is the rule that if possible a Federal statute should be so construed as to avoid any suggestion of conflict with, and unconstitutionality of, a State statute.

The misconstruction which raises the controverted constitutional questions is arrived at by finding either an express prohibition in the phrase in Section 826 (b) of the Internal Revenue Code "so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before distribution" or an implied prohibition in the nature of the tax, which is an estate tax rather than an inheritance or succession tax. Properly construed, the statute authorizes, rather than prohibits, a State statute directing apportionment in the absence of a testamentary provision to the contrary.

If there had been no New York statute on the subject at all and the will had directed that the Federal estate tax should be apportioned, it would have been possible to attack the effectiveness of that direction on precisely the same grounds on which the effectiveness of Section 124 of the Decedent Estate Law has been attacked in this case. It could have been claimed that Congress intended that the tax should be paid out of the

residuary estate and that any attempt by a testator to provide otherwise was in conflict with the supreme law of the land and therefore ineffectual. The claim could have been supported by the same historical expositions of the nature of the tax and by the same hard worn and far stretched quotation from Section 826 (b) to the effect that the tax is to be paid before distribution. The briefs could have been just as long and just as learned as they have been in the case at bar. It is recognized by everybody that there would have been a short answer to all the language and all the learning. This answer would have been that Congress expressly authorized a testator to provide for an apportionment of the tax in his will. It did this in Section 826 (b) already quoted, when it said "so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." It did it again in Section 812 (d) when it said that if the tax "either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or * * *" is payable out of a charitable gift which would otherwise be deductible, then the amount of the deduction shall be the amount of the gift reduced by the amount of the tax payable out of it.

The same provisions in the Federal statute are equally conclusive that Congress intended to authorize, rather than to prohibit, an apportionment of the tax by the combination of a State statute creating a presumptive apportionment and a will adopting the statutory apportionment by silence. The fact that Congress was willing that a testator should direct apportionment by his will proves that Congress saw nothing detrimental to its objectives in such a direction. If Congress had believed that the interests of the United States or the welfare of estate beneficiaries depended upon the payment of the tax out of the residuary estate, it would not have given testators permission to direct apportionment. The fact that Congress did give such permission is a complete answer to the involved line of reasoning whereby it is attempted to prove that Congress was concerned not alone with the imposition of an estate tax and the collection of it, but also with the way in which the burden of payment was to be distributed among

the beneficiaries of the estate. For if Congress was willing that testators should direct apportionment, it can not have been one of its objectives to assure payment out of the residue and by the residuary legatee. And if that was not one of its objectives, then there is no basis whatever for construing the Federal statute as prohibiting presumptive apportionment by State statute and there is every reason for construing it as providing for the computation and the collection of the tax, and nothing more.

This is really decisive of the case. If Congress had no interest in where the burden of the tax fell as between the various beneficiaries of the estate, then the statute can not be construed so as to prohibit a State statute containing a rebuttable direction for apportionment. But the logic of the situation goes further. It leads to the conclusion that, properly construed, the statute does not merely *fail to prohibit* apportionment by a combination of a State statute creating a presumptive apportionment and a will adopting the apportionment by silence, but *actually authorizes* such an apportionment. For the truth is that under such circumstances the direction for apportionment comes from the testator and the will, not from the legislature and the statute.

It is axiomatic that a will is drawn against the background of State law and that it contains not only what is within its four corners but also all the pertinent portions of the statute books and the decided cases. In *Matter of Bergdorf*, 206 N. Y. 306, 316, the Court, in referring to the rules with respect to executors laid down by the legislature, said that they "affect the testamentary disposition and provisions as though embodied in the will." See *Irving Trust Co.* v. *Day*, 314 U. S. 556.

In connection with various situations in which ambiguity, litigation and general dissatisfaction had frequently arisen, the legislature has intervened in aid of testators and testamentary beneficiaries by creating rebuttable presumptions with respect to the effect of certain testamentary provisions. One familiar example is Section 47 (a) of the Decedent Estate Law. The question whether in making a gift to "issue" a testator intends to make a gift *per capita* or *per stirpes*, was a mooted one which the legislature resolved by directing that if in equal

degree of consanguinity the issue should take *per capita*, but if in unequal degree, *per stirpes*, unless a contrary intention is expressed in the will. Similarly in connection with stock dividends, a presumption was created by Section 17 (a) of the New York Personal Property Law, which directs that "unless otherwise provided in the will" a stock dividend is principal.

Section 124 of the Decedent Estate Law says that unless a testator provides to the contrary, the estate tax shall be apportioned. The testator has the alternative of rebutting the statute or adopting it. Obviously the testator has the last word. If he rebuts it, everyone would admit that the direction for non-apportionment and some different source of payment is made by him. If he wants to adopt the statute there are two ways in which he may do it. He may adopt it in words, or he may adopt it by silence. If he adopts it in words, everyone would admit that it is the testator who directs the apportionment. If the testator adopts the statute by silence, it is equally true that it is he who directs the apportionment. The determination whether the direction by the testator is to be in express words or by silence rests almost entirely with the legal draftsman of the will. Some lawyers have a predilection for short wills and omit every provision which they deem unnecessary. Others prefer to insert express and positive directions even though they are not necessary. So far as the testator is concerned, it is all one to him. All that he knows is that he wants the estate tax apportioned and relies upon his lawyer to draft a will which will so direct. The important thing is that it is the testator who has the last word and by whose direction whether expressed by words or silence the apportionment is made.

To sum up: Congress must be presumed to have known that a State statute fixing the construction or effect of a will is a part of the will. Therefore, an Act of Congress expressly permitting an apportionment of the estate tax by will should be construed as authorizing either (1) an apportionment by express testamentary direction unaided by any State statute, (2) an apportionment by express testamentary adoption of a State statute directing apportionment in the absence of a con-

trary provision, or (3) an apportionment by a testamentary adoption of such a State statute implied from the silence of the will.

When this construction is given to the Federal statute, there can be no claim of conflict between Federal and State jurisdiction or of the unconstitutionality of Section 124 of the Decedent Estate Law.

Conclusion.

The decision of the Court of Appeals and the order of the Surrogate's Court entered on the remittitur of the Court of Appeals should be reversed.

Respectfully submitted,

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